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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 OX LABS INC., a California
15 corporation,

16 Plaintiff,

17 v.

18 BITPAY, INC., a Delaware corporation,
19 and DOES 1-10,

20 Defendants.
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Case No. CV 18-5934-MWF(KSx)

**NOTICE OF MOTION AND
PRETRIAL DISPOSITIVE
MOTION OF PLAINTIFF OX
LABS INC.**

Date: January 16, 2020, 3:00 p.m.
Place: Courtroom 5A

Pretrial Conference: January 27, 2020
Trial: February 4, 2020

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NOTICE OF MOTION AND MOTION**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

PLEASE TAKE NOTICE that on January 27, 2020, at 3:00 p.m., in the U.S. District Court for the Central District of California, Western Division, Courtroom 5A, the Honorable Michael Fitzgerald presiding, and in accordance with the stipulation of the parties and the Court's November 25, 2019 Order Regarding Pretrial and Trial Proceedings [Dkt. 65], Plaintiff Ox Labs Inc. ("Ox Labs") will and hereby does move for a dispositive order holding that: (1) liability on Ox Labs' first claim for relief (Conversion) is established as a matter of law; (2) the affirmative defenses of Defendant BitPay, Inc. ("BitPay"), and each of them, fail as a matter of law; and (3) Ox Labs is entitled to the relief sought in its Complaint as a matter of law.

Ox Labs' motion will be based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities and Supplemental Declaration of Akbar Thobhani filed herewith, the pleadings on file in this matter, the briefing and evidence submitted in support of and in opposition to BitPay's motion for summary judgment, all pretrial filings, the arguments of counsel, and such further matter as the Court may consider in rendering its decision.

Dated: December 20, 2019

Respectfully Submitted,

LEIDER + AYALA-BASS LLP

By: /s/ Philip A. Leider
Philip A. Leider

Attorneys for Plaintiff
OX LABS INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The existing record in this case makes one thing abundantly clear: There is no need for a jury trial in this matter. Ox Labs submits that BitPay's liability for Conversion is established as a matter of law. Moreover, all of BitPay's affirmative defenses fail as a matter of law. Finally, California law and the undisputed facts establish conclusively that Ox Labs is entitled to the relief sought in its Complaint, *i.e.*, the return of 200 Bitcoins. The Court should accordingly enter judgment in favor of Ox Labs and order BitPay to return 200 Bitcoins to Ox Labs.

II. BACKGROUND

This is an action for conversion and unjust enrichment brought by Plaintiff Ox Labs against Defendant BitPay. Complaint [Dkt. 1] at 5; Final Pretrial Conference Order [Dkt. 54-1] ("Pretrial Order") at 2. Ox Labs is a California corporation that provides an advanced platform on which professionals can trade cryptocurrencies, including but not limited to Bitcoins. Pretrial Order at 2. The platform is operated by SFOX, a wholly-owned subsidiary of Ox Labs. This memorandum will refer to Ox Labs and SFOX collectively as "Ox Labs."

BitPay is a Bitcoin payment service provider and processor. *Id.* at 3. At the time of the relevant events in this case, BitPay had been a customer of Ox Labs trading on the SFOX platform for several years. *Id.*

On July 10, 2015, in connection with a transaction, Ox Labs inadvertently over-credited 200 Bitcoins to BitPay's account. *Id.* Neither Ox Labs nor BitPay realized the error at that time. *Id.* In late 2016, SFOX became aware that it had 200 fewer Bitcoins in its accounts than it should have had, but, after diligently investigating, it was unable to determine the source of the discrepancy. Declaration of Akbar Thobhani in Support of Plaintiff Ox Labs, Inc.'s Opposition to BitPay, Inc.'s Motion for Summary Judgment [Dkt. 31-2] ("Thobhani MSJ Dec.") at ¶ 4.

1 At no time prior to February 2017 was Ox Labs aware that BitPay had received the
2 200 Bitcoins or aware what BitPay had done with the 200 Bitcoins. *Id.* at ¶ 5.

3 At some time before February 2017, BitPay’s auditors noticed a discrepancy
4 in BitPay’s accounts during an account reconciliation process. Declaration of
5 Kirstie Getch in Support of Defendant BitPay, Inc.’s Motion for Summary
6 Judgment (“Getch MSJ Dec.”) at ¶ 3. After looking further into the matter,
7 BitPay’s controller, Kirstie Getch, suspected that the discrepancy may have been
8 due to trading activity with Ox Labs. *Id.* Ms. Getch brought the matter to the
9 attention of BitPay’s executives, and BitPay’s executives reached out to Ox Labs
10 for more information in February of 2017. *Id.* Ox Labs looked into the issue and
11 discovered that the error had occurred at the time SFOX was in the processing of
12 switching to a new “wallet” system; a mix-up in Bitcoin addresses had caused the
13 crediting error. Thobhani MSJ Dec. at ¶ 5.

14 The parties negotiated how best to proceed in the weeks following BitPay’s
15 disclosure of the error. Pretrial Order at 3; Thobhani MSJ Dec. at ¶ 6. BitPay
16 offered to pay approximately \$57,000 to Ox Labs, which it asserted were the
17 proceeds of transactions in which it sold or traded the 200 Bitcoins it received from
18 Ox Labs. Thobhani MSJ Dec. at ¶ 6. This offer was patently unfair because the
19 Bitcoins at the time had risen in value to more than \$200,000. In addition, BitPay
20 offered no evidence that it had sold the Bitcoins or to whom or when or at what
21 price. Supplemental Declaration of Akbar Thobhani (“Thobhani Supp. Dec.”) at ¶¶
22 4-5. In any event, Ox Labs never consented to BitPay selling the Bitcoins it had
23 received in error. *Id.* at ¶¶ 3-6. Ox Labs proposed various creative business
24 solutions to resolve the impasse, but BitPay rejected each one. On May 23, 2017,
25 Ox Labs finally demanded that BitPay return 200 Bitcoins, and BitPay
26 unequivocally refused to do so on June 6, 2017. Pretrial Order at 3. On June 27,
27 2017, counsel for BitPay sent a letter to Ox Labs enclosing a check for the
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1 approximately \$57,000 it contended it owed, which Ox Labs never accepted or
2 cashed. BitPay's Answer [Dkt. 13] at 2.

3 In August and October of 2017, as a result of what is termed a "hard fork" in
4 the industry, anyone in possession of Bitcoins also received new cryptocurrencies
5 called Bitcoin Gold and Bitcoin Cash in equal amounts. Pretrial Order at 3. In
6 other words, by refusing to return 200 Bitcoins to Ox Labs after Ox Labs' lawful
7 demand, BitPay deprived Ox Labs of 200 Bitcoin Gold and 200 Bitcoin Cash it
8 would otherwise have received. In November of 2018, Bitcoin Cash underwent a
9 further hard fork into Bitcoin SV. By the time Ox Labs filed the Complaint in this
10 matter on July 6, 2018, the value of the Bitcoins at issue had risen to \$1,324,728.

11 **III. ARGUMENT**

12 **A. Liability on Ox Labs' First Claim for Relief (Conversion) Is** 13 **Established as a Matter of Law**

14 **1. Governing Principles and Elements of Conversion**

15 California law defines conversion as "any act of dominion wrongfully
16 asserted over another's personal property in denial of or inconsistent with his rights
17 therein." *Igaue v. Howard*, 114 Cal. App. 2d 122, 126 (1952). "Unjustified
18 refusal to turn over possession on demand constitutes conversion *even where*
19 *possession by the withholder was originally obtained lawfully* and of course so does
20 an unauthorized sale." *Cerra v. Blackstone*, 172 Cal. App. 3d 604, 609 (1985)
21 (emphasis added, citations and quotations marks omitted). "Conversion is a strict
22 liability tort. The foundation of the action rests neither in the knowledge nor the
23 intent of the defendant. Instead, the tort consists in the breach of an absolute duty;
24 the act of conversion itself is tortious. Therefore, questions of the defendant's good
25 faith, lack of knowledge, and motive are ordinarily immaterial." *Los Angeles Fed.*
26 *Credit Union v. Madatyan*, 209 Cal. App. 4th 1383, 1387 (2012).

27 Pursuant to California's judicially adopted jury instructions, Ox Labs must
28

1 prove the following elements to establish liability on its claim for Conversion:

- 2 (1) That Ox Labs owned or had a right to possess 200 Bitcoins;
- 3 (2) That BitPay substantially interfered with Ox Labs' 200 Bitcoins
- 4 by knowingly or intentionally selling them or refusing to return
- 5 them after Ox Labs demanded their return;
- 6 (3) That Ox Labs did not consent;
- 7 (4) That Ox Labs was harmed; and
- 8 (5) That BitPay's conduct was a substantial factor in causing Ox
- 9 Labs' harm.

10 See California Civil Jury Instructions ("CACT") 2100 (2019). Admissions by

11 BitPay and the existing record conclusively establish all of these elements.

12 **2. Admissions and Undisputed Evidence Establishing Liability**

13 **a. Ox Labs Owned and Had a Right to Possess 200**

14 **Bitcoins**

15 The parties have stipulated: "On July 10, 2015, Ox Labs inadvertently

16 credited 200 Bitcoins to BitPay's account in two deposits of 100 Bitcoins." Pretrial

17 Order at 3. The undisputed evidence confirms that Ox Labs both owned and had a

18 right to possess the 200 Bitcoins it inadvertently credited to BitPay. See Thobhani

19 MSJ Dec. at ¶¶ 4-5, 8; Thobhani Supp. Dec. at ¶¶ 3, 5.

20 **b. BitPay Substantially Interfered with Ox Labs' 200**

21 **Bitcoins**

22 The parties have stipulated that Ox Labs demanded BitPay return 200

23 Bitcoins to Ox Labs on May 23, 2017, and BitPay refused Ox Labs' demand on

24 June 6, 2017. (Pretrial Order at 3.) Moreover, BitPay has stymied every attempt

25 Ox Labs has made to retrieve its property. (Thobhani Supp. Dec. at ¶¶ 4, 5.)

26 BitPay's continuing refusal to return 200 Bitcoins it received in error from

27 Ox Labs, despite repeated demands, constitutes conversion. See *Cerra*, 172 Cal.

28 App. 3d at 609 ("Unjustified refusal to turn over possession on demand constitutes

conversion even where possession by the withholder was originally obtained

lawfully"); *Nicholson v. McDonald*, 193 Cal. App. 2d 675, 680 (1961) ("McDonald

1 had no legal right to retain the property in his possession, and therefore his refusal
2 to give up possession on Nicholson’s demand amounted to conversion.”) (citing 48
3 Cal. Jur. 2d §§ 20 and 22, pp. 557, 562)).

4 In a stubborn attempt to avoid returning Ox Labs’ property,¹ BitPay has
5 asserted repeatedly that it sold or transferred the 200 particular Bitcoins at issue.
6 *See, e.g.,* Defendant BitPay, Inc.’s Memorandum of Contentions of Fact and Law
7 [Dkt. 41] at 6. For purposes of liability, however, “any unauthorized sale or
8 transfer of another’s property constitutes conversion.” *MTC Elec. Techs. Co. v.*
9 *Leung*, 889 F. Supp. 396, 403 (C.D. Cal. 1995) (citing *Cerra*, 172 Cal. App. 3d at
10 609). In other words, by arguing that it sold or transferred Ox Labs’ property,
11 BitPay has actually *conceded* its liability for conversion. *See Alonso v. Badger*, 58
12 Cal. App. 2d 752, 758 (1943) (“The action of appellant in exercising dominion and
13 control over the property of respondents and making a sale thereof without such
14 owners’ consent amounted to a conversion.”) (citing *Lusitanian-Am. Dev. Co. v.*
15 *Seaboard Dairy Credit Corp.*, 1 Cal. 2d 121, 129 (1934)); *Mier v. S. Ca. Ice Co.*, 56
16 Cal. App. 512, 517 (1922) (“[T]he general rule is that one who sells the property of
17 another, *even though he believes he has a right so to do*, is liable in trover to the
18 true owner.”) (emphasis added, citations omitted).

19 Because BitPay had no right to dispose of the contested Bitcoins without Ox
20 Labs’ consent, “it does not lie in [its] mouth to set up [its] wrongful act in answer to

21 ¹ BitPay’s meritless contention that the remedy of specific recovery or
22 restitution of the property at issue is not warranted in this matter because BitPay no
23 longer possesses the *exact same* 200 Bitcoins Ox Labs credited to it will be
24 addressed below as a remedial issue. For purposes of *liability*, it is sufficient that
25 BitPay exercised “wrongful dominion” over Ox Labs’ property, and it is immaterial
26 whether BitPay exercised that dominion under a mistaken belief that it owned or
27 had a right to sell or transfer the property. *See Newhart v. Pierce*, 254 Cal. App. 2d
28 783, 793 (1967) (noting that a “taking clouded by mistake is no less a wrongful
taking” and the “wrongful exercise of dominion over another’s personal property is
the gist of the action”) (citations omitted).

[this] action, or to say that [it] is unable to comply with the demand for possession because of [its] own breach of duty.” *Fran-Well Heater Co. v. Robinson*, 182 Cal. App. 2d 125, 131 (1960) (citation and internal quotation marks omitted). There can be no doubt that BitPay substantially interfered with Ox Labs’ property. (Thobhani Supp. Dec. at ¶¶ 4, 5.)

c. Ox Labs Did Not Consent

There is no evidence, and no plausible argument, that Ox Labs authorized or consented to BitPay’s sale or transfer of the property. It is undisputed that Ox Labs was unaware that BitPay received the 200 Bitcoins until long after BitPay asserts its sold or transferred them to others. Any sale or transfer was done without Ox Labs’ permission. (Thobhani MSJ Dec. at ¶¶ 4-5, 7; Thobhani Supp. Dec. at ¶¶ 3-5 .)

d. Ox Labs Was Harmed

It is undisputed that Ox Labs was harmed. Ox Labs now has 200 fewer Bitcoins than it should have, and it has been deprived of many business opportunities, as well as the “hard fork” benefits—200 Bitcoin Gold, 200 Bitcoin Cash, and 200 Bitcoin SV – that would otherwise have accrued to Ox Labs. (Thobhani MSJ Dec. at ¶¶ 8-12.)

e. BitPay’s Conduct Was a Substantial Factor in Causing Ox Labs’ Harm

“A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.” CACI 430 (2019); *see generally Rutherford v. Owens- Illinois, Inc.*, 16 Cal. 4th 953, 968-69 (1979).

It is undisputed that BitPay’s refusal to return 200 Bitcoins to Ox Labs (or, alternatively, BitPay’s unauthorized sale or transfer of Ox Labs’ 200 Bitcoins and refusal to provide information about the transactions) has been a substantial factor in causing Ox Labs’ harm. (Thobhani Supp. Dec. at ¶¶ 3-6.). While Ox Labs was

1 responsible for inadvertently transferring 200 Bitcoins to BitPay in the first
 2 instance, BitPay's refusal to return 200 Bitcoins (and, *according to BitPay*, its
 3 unauthorized transfer/sale of the property and inability to identify the
 4 transferee/buyer) is unquestionably a "substantial factor" in causing and continuing
 5 Ox Labs' harm. *See Fearon v. Dep't of Corrs.*, 162 Cal. App. 3d at 1257; *Smith v.*
 6 *Greenfield State Bank*, 222 Cal. App. 2d at 869, 873 (1963); *Nicholson v.*
 7 *McDonald*, 193 Cal. App. 2d at 680; *Wade v. Markwell & Co.*, 118 Cal. App. 2d
 8 410, 433-34 (1953); *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 143 (1913);
 9 *Alonso v. Badger*, 58 Cal. App. 2d at 758; *Lusitanian-Am. Dev. Co. v. Seaboard*
 10 *Dairy Credit Corp.*, 1 Cal. 2d at 129.

11 **B. BitPay's Affirmative Defenses, and Each of Them, Fail as a Matter**
 12 **of Law**

13 All of BitPay's four asserted affirmative defenses fail. *See* Pretrial Order at
 14 10. They either are not affirmative defenses (but are instead simply snippets from
 15 California case law or go to elements of the claims for relief) or are contrary to
 16 controlling case law and established facts. Moreover, BitPay has not submitted
 17 proposed jury instructions on *any* of the purported affirmative defenses (except for
 18 a facially inappropriate proposed instruction on the statute of limitations). *See*
 19 Defendant BitPay, Inc's Proposed Jury Instructions [Dkt. 48] ("BitPay Proposed
 20 JI"). The Court should therefore strike the proposed instructions and the underlying
 21 affirmative defenses. *See* Order re Jury Trial [Dkt. 22] at 7 (requiring "strict
 22 compliance" with Civil Local Rule 16, including the exchange of proposed jury
 23 instructions before the Rule 16 pretrial conference of counsel).

24 **1. BitPay's Pre-Litigation Settlement Offer Is Irrelevant**

25 The Court has already effectively disposed of BitPay's Third Affirmative
 26 Defense ("The claims are barred by payment") and Fifth Affirmative Defense ("The
 27 remedy for conversion has already been tendered"). The gist of these supposed
 28

1 defenses is that BitPay’s counsel previously sent a check to Ox Labs for the amount
 2 BitPay contends Ox Labs is entitled to receive in damages in this action. *See*
 3 Pretrial Order at 15, 17. However, Ox Labs never cashed the check and has never
 4 accepted BitPay’s “tender” of the amount offered. Kunin Declaration, Exhibit A
 5 [Dkt. 29-3]. Thus, BitPay’s unaccepted “offer of settlement” (Order Re: Defendant
 6 BitPay, Inc.’s Motion for Summary Judgment [Dkt. 36] (“MSJ Order”) at 4) was
 7 and remains a “legal nullity.” *Campbell-Ewald Co. v. Gomez*, 577 U.S. ___, 136 S.
 8 Ct. 663, 670 (2016). Moreover, even if money damages were the only available
 9 remedy here – a contention that Ox Labs vigorously contests in seeking return of its
 10 property, *i.e.*, 200 Bitcoins – the amount BitPay tendered concededly does not
 11 include the required interest or fair compensation for the expense Ox Labs incurred
 12 recovering the amount owed. *See* Cal. Civ. Code § 3336; MSJ Order at 12. Thus,
 13 there is no factual basis for BitPay’s Third and Fifth Affirmative Defenses, even if
 14 there were a legal basis or proposed jury instruction for them, which there is not.

15 **2. BitPay’s Statute of Limitations Defense Also Fails**

16 Neither the Court nor a jury should undertake the questionable statute of
 17 limitations analysis that BitPay has proposed. (Pretrial Order at 14-15; BitPay
 18 Proposed JI at 8). The applicable law and undisputed facts clearly undermine any
 19 such defense, even if BitPay had proposed a proper instruction.

20 **a. The Continuing Violation Doctrine Applies**

21 California law, as interpreted by federal courts, makes clear that the statute of
 22 limitations on a claim for conversion *does not even start to run* if the plaintiff has
 23 demanded return of the property at issue and the defendant has not returned it. As
 24 the California Supreme Court decisively held: “Conversion has been defined as an
 25 act of willful interference with a chattel, done without lawful justification, by which
 26 any person entitled thereto is deprived of use and possession. *It is a continuing*
 27 *tort—as long as the person entitled to the use and possession of his property is*
 28

1 *deprived thereof*. . . it does not necessarily end when original wrongdoer transfers
 2 physical possession to another.” *De Vries v. Brumback*, 53 Cal. 2d 643, 646-67
 3 (1960) (In Bank) (emphasis added, citations and internal punctuations omitted).

4 Federal courts have repeatedly followed *De Vries* in holding that refusal to
 5 return property after a lawful demand prolongs the violation:

6 When a person who wrongfully possesses a piece of property fails to
 7 comply with a lawful demand for that property, the wrongful possessor’s
 8 failure to comply with the lawful demand constitutes conversion. The
 9 conversion does not end at the moment a lawful demand is refused, it
 10 continues as long as the person entitled to the use and possession of his
 property is deprived thereof. The conversion continues from the time the
 first lawful demand is refused until the lawful owner regains possession
 of his property.

11 *In re Vorhariwatt*, No. 17-cv-1255-WQH-MDD, 2017 U.S. Dist. LEXIS 208560, at
 12 *9-10 (S.D. Cal. Dec. 18, 2017) (citations and internal punctuation omitted). *See*
 13 *also Hullinger v. Anand*, No. CV 15-07185 SJO (FFMx), 2016 U.S. Dist. LEXIS
 14 111918, at *10 (C.D. Cal. Aug. 11, 2016) (“California law treats conversion, fraud,
 15 and constructive fraud similarly with respect to the theory of ongoing liability.”);
 16 *AB Inv. v. Regal One*, No. CV 09-02983-RGK (FFMx), 2009 U.S. Dist. LEXIS
 17 135956, at *3-4 (C.D. Cal Dec. 22, 2009) (“[C]onversion is a continuing tort as
 18 long as the person entitled to the use and possession of his property is deprived
 19 thereof and does not necessarily end when the original wrongdoer transfers physical
 20 possession to another.”) (citations and internal punctuation omitted).

21 In this case, it is undisputed that Ox Labs demanded the return of 200
 22 Bitcoins on May 27, 2017, BitPay refused that demand on June 6, 2017, and BitPay
 23 has not returned possession of Ox Labs’ property to this day. *See* Pretrial Order at
 24 3. Accordingly, *De Vries* and its progeny dictate that the violation continues and,
 25 as a result, the statute of limitations has not even begun to run in this matter.

26 **b. Ox Labs Timely Filed its Complaint**

27 Even if the continuing violation doctrine did not apply, the date of
 28

conversion in this matter would be the date on which BitPay refused to return the property, *i.e.*, June 6, 2017, which is less than either two or three years before the filing of the Complaint on July 6, 2018. *See Bufano v. San Francisco*, 233 Cal. App. 2d 61, 70 (1965) (“Where an original taking is wrongful, the bar of the statute runs from the time of the unlawful taking, but where the original taking is lawful, *the statute is not set in motion until the return of the property has been demanded and refused* or until a repudiation of the owner’s title is clearly and unequivocally brought to his attention.”) (emphasis added). The statute of limitations defense therefore fails as a matter of law, even if BitPay were correct that a two-year limitations applies (which is not correct, as demonstrated below).

c. A Three-Year Statute of Limitations Applies

The statute of limitations for a claim for conversion is generally three years. Cal. Civ. Proc. Code § 338(c). However, BitPay contends that the conversion of Bitcoins should instead be governed by a two-year statute of limitations applicable to “intangible” property. *See* Cal. Civ. Proc. Code § 339; *OC Kickboxing & Mixed Martial Arts, Inc. v. Warrior Arts All., Inc.*, No. SACV19-0004-DOC (DFMx), 2019 WL 3210093, at *4 (C.D. Cal. May 3, 2019).

No controlling authority addresses whether Bitcoin is tangible or intangible property for purposes of California law of conversion. However, the reasoning of the most germane cases, *Fabrimon Prods. v. United California Bank*, 265 Cal. App. 2d 113 (1968) and *Italiani v. Metro-Goldwyn-Mayer Corp.*, 45 Cal. App. 2d 464 (1941), demonstrates that Bitcoin is not subject to the narrower two-year statute.

In *Fabrimon*, the Court held that a claim for specific recovery of personal property (a check for money in that instance) is subject to the three-year statute of limitations of Civil Procedure Code section 338(c) (formerly Civil Procedure Code section 388(3)). *See* 265 Cal. App. 2d at 117. The court distinguished the case at bar from those involving “intangible property rights” such as *Italiani*, which

1 concerned “plagiarism of a motion picture scenario.” *Id.* (citing *Italiani*, 45 Cal.
 2 App. 2d at 466-67)(two-year statute of limitations under § 339 applies to
 3 “intangible incorporeal rights [that] exist separate and apart from the property in the
 4 paper on which it is written, or the physical substance in which it is embodied.”)).

5 In *Italiani*, a plaintiff wrote an idea for a movie scenario on a piece of paper,
 6 sent it to the defendant, and later accused the defendant of stealing his idea and
 7 using it for a movie. The appellate court trained its focus on the fact that the
 8 plaintiff was seeking compensation for the “idea” stolen (*i.e.*, the incorporeal right)
 9 rather than the paper on which the idea was written, and thus the two-year statute of
 10 limitations for intangible property applied rather than the usual three-year statute.
 11 That pivotal distinction is inapplicable in the instant case because Bitcoin (*i.e.*, a
 12 commodity with hard monetary value) is not merely an “idea” divorceable from the
 13 paper on which it is written or, rather, the blockchain on which it is recorded. This
 14 is why the few courts to have considered the nature of Bitcoins have concluded that
 15 they are commodities subject to regulation by the Commodities Futures Trading
 16 Commission and other federal agencies. *See CFTC v. McDonnell*, 287 F. Supp. 3d
 17 213, 228-29 (E.D.N.Y. 2018).² As *Italiani* elaborated:

18 [CCP § 338] seeks to prescribe a [three-year] statute of limitation for those
 19 actions which may be classed broadly under the head of the common law

20 ² As the court explained in *McDonnell*:

21 Virtual currencies are generally defined as ‘digital assets used as a
 22 medium of exchange.’ . . . They are often described as ‘cryptocurrencies’
 23 because they use ‘cryptographic protocols to secure transactions . . .
 24 recorded on publicly available decentralized ledgers,’ called
 25 ‘blockchains.’ . . . They have some characteristics of government paper
 26 currency, commodities, and securities. . . ‘It is a lot like gold, in fact. The
 27 difference [] is that it is digital rather than a heavy, unwieldy object. That
 28 means that it could serve the same purposes as gold in terms of a
 currency, but much more efficiently because it does not have any mass
 and can be sent easily from place to place.’

Id. at 218 (citations omitted).

actions of trover, detinue and replevin – and with the latter’s statutory counterpart of claim and delivery. All of these actions involve the concept of interference with the possession of, or damage to, some specific tangible property, and are not concerned with intangible or incorporeal rights which may exist in connection with, *or entirely apart from any particular piece of physical property*.

Italiani, 45 Cal. App. 2d at 467 (emphasis added). Bitcoins do not exist in a detached realm of ideas, like some forms of intellectual property. They are instead digital currencies with a sophisticated system of digital recording and verification:

[Bitcoin] operates using blockchain technology, a shared public ledger reinforced by cryptography which records all confirmed transactions. . . . Bitcoin wallets keep a secret piece of data called a private key or seed, which is used to sign transactions. This signature both prevents the transaction from being altered once it has occurred and allows the transacting parties to remain anonymous, as only the signatures are recorded in the public log.

Symphony FS. v. Thompson, No. 5:18-cv-3904, 2018 U.S. Dist. LEXIS 214641, at *1 n.1 (E.D. Pa. Dec. 20, 2018) (citation omitted). Accordingly, conversion of Bitcoins should be subject to the three-year statute of limitations under Civil Procedure Code section 338(c) applicable to claims of conversion and not the two-year statute of limitations of Civil Procedure Code section 339 applicable narrowly to intangible property such as movie ideas.

3. BitPay’s Assertion That it No Longer Has the Bitcoins at Issue is Not a Defense to a Claim of Conversion

As demonstrated above, BitPay’s Fourth Affirmative Defense (“The claims are barred because BitPay no longer has the Bitcoin at issue to return” [Pretrial Order at 10]) is not a defense. In actuality, it is a concession of its liability.

Under California law, it is “immaterial” to a claim of conversion “that the property in question may be in the actual possession of a third party.” *Pilch v. Milikin*, 200 Cal. App. 2d 212, 224 (1962). This is because the defendants’ interference with the plaintiff’s right to possess the property is sufficient, in and of itself, to constitute a conversion, regardless whether the property has been transferred to another person or sold. “Any wrongful assumption of authority over

1 chattels, inconsistent with another's right of possession or subversive of his vested
 2 interest therein, amounts to conversion." *Kessinger v. Organic Fertilizers, Inc.*,
 3 151 Cal. App. 2d 741, 753 (1957) (citation and internal quotation marks omitted).
 4 Thus, in a common law action for "detinue," a species of the modern tort of
 5 conversion where the plaintiff sought the return of personal property wrongfully
 6 detained, "it was no defense . . . to plead that the defendant, before the
 7 commencement of the action, had wrongfully disposed of the property, and,
 8 therefore, was not in possession of it." *Fran-Well Heater*, 182 Cal. App. 2d at 130
 9 (citation and internal quotation marks omitted). Because the defendant had no right
 10 to dispose of the contested property absent consent from the plaintiff "it does not lie
 11 in his mouth to set up his wrongful act in answer to such action, or to say that he is
 12 unable to comply with the demand for possession because of his own breach of
 13 duty." *Id.* at 131 (citation and internal quotation marks omitted). BitPay's Fourth
 14 Affirmative Defense therefore fails as a matter of law and seals its liability.

15 **C. Ox Labs Is Entitled to the Relief Sought in Its Complaint as a**
 16 **Matter of Law**

17 The primary relief Ox Labs seeks in this action is the return of 200 Bitcoins.
 18 (Complaint at 5; Pretrial Order at 6.) Since, as demonstrated above, BitPay is liable
 19 for Conversion and all of its affirmative defenses lack merit, Ox Labs is entitled to
 20 recover 200 Bitcoins. *See Minsky v. L.A.*, 11 Cal. 3d 113, 121 (1974) ("Where a
 21 wrongdoer has converted . . . personal property, the injured owner must elect
 22 between his right of ownership and possession (with the remedy of specific
 23 recovery) and his right to compensation (with the remedies of damages for
 24 conversion or quasi-contract recovery of value on theory of waiver of tort).") (citing
 25 2 Witkin, Cal. Procedure (2d ed. 1970) Actions, § 114, p. 983); *Flores v. Cal. Dep't*
 26 *of Corrs. & Rehab.*, 224 Cal. App. 4th 199, 206 (2014), *review denied* (Apr. 30,
 27 2014) ("Available remedies for conversion include specific recovery of property
 28

1 with damages for its detention and damages based on the value of the property.”)
2 (citing Cal. Civ. Code §§ 3336, 3379; *Allstate Leasing Corp. v. Smith*, 238 Cal.
3 App. 2d 128, 132-133 (1965)); *Adler v. Taylor*, CV 04-8472-RGK (FMOx), 2005
4 U.S. Dist. LEXIS 5862, at *9 (C.D. Cal. Feb. 2, 2005) (“Because the Complaint
5 supports a conversion claim, it also supports a specific recovery remedy.”).

6 Attempting to avoid returning what it received, BitPay has taken the
7 exceedingly formalistic position that it cannot return *the same exact* 200 Bitcoins
8 Ox Labs originally possessed. This is not what Ox Labs seeks and manifestly not
9 what the law requires – otherwise a recipient of mistakenly given property could
10 simply sell the property immediately and, when subject to a demand from the
11 owner, claim that it cannot be returned (if the value rose) or return an identical item
12 (if the value declined). Case law authorizing the return of money mistakenly
13 provided does not require that the exact same dollar bills be traced back to the
14 transaction in order to justify its recovery. *See Welco Elecs., Inc. v. Mora*, 223 Cal.
15 App. 4th 202, 209 (2014) (“Money may be the subject of conversion if the claim
16 involves a specific, identifiable sum; it is not necessary that each coin or bill be
17 earmarked.”) (citing *Haigler v. Donnelly*, 18 Cal. 2d 674, 681 (1941)).

18 BitPay’s formalistic contention should be rejected for a further reason.
19 Bitcoins are “fungible” – *i.e.*, they are a digital currency or medium of exchange –
20 and one Bitcoin is the same as any other in all material respects. BitPay concedes
21 that it has had more than 200 Bitcoins at every moment relevant to this case that it
22 could restore to Ox Labs. *See* Pretrial Order at 3 (“At all times relevant to this
23 matter, BitPay possessed more than 200 Bitcoins”). Ox Labs has no objection to
24 BitPay restoring 200 Bitcoins that are not the same ones Ox Labs originally
25 credited to BitPay. (Thobhani Supp. Decl. at ¶ 6). *See Horn v. Klatt*, 65 Cal. App.
26 2d 510, 521 (1944) (“[W]here the subject matter consists of chattels or choses in
27 action which are identical in kind and quality with other chattels or choses in action,
28

1 restitution may be made by giving other things of the same kind and quality.”).
 2 *Horn* cites the Restatement of Restitution for this proposition and specifically
 3 mentions “shares in a corporation” and “bonds issued by a corporation” as
 4 examples of such fungible items. Bitcoins are clearly analogous.

5 No court would bar an action for restitution under the Unfair Competition
 6 Law (Business & Professions Code § 17200) because the defendant no longer
 7 possessed the precise dollar bills it wrongly transferred to someone else. Moreover,
 8 whether the value of those dollars had risen or fallen with respect to other
 9 currencies does not matter – Courts simply award the same number of dollars. The
 10 same is true of shares of a corporation and bonds issued by a corporation. Similarly
 11 here, BitPay should not be immune from the remedy of specific recovery simply
 12 because it claims that it transferred or sold the Bitcoins Ox Labs provided (and
 13 evidently bought others with the proceeds) or because the value of the Bitcoins has
 14 fluctuated when measured against different currencies.

15 **IV. CONCLUSION**

16 There is no need for the jury trial this busy Court has scheduled to begin on
 17 February 4, 2020. Liability is established, each of Defendant’s affirmative defenses
 18 fails, and Plaintiff is entitled to the remedy it has requested. Accordingly, the Court
 19 should enter judgment in favor of plaintiff Ox Labs and order defendant BitPay to
 20 restore 200 Bitcoins along with other authorized relief.

21 Dated: December 20, 2019

Respectfully Submitted,

LEIDER + AYALA-BASS LLP

23 By: /s/ Philip A. Leider

Philip A. Leider

25 Attorneys for Plaintiff
 26 OX LABS INC.

CERTIFICATE OF SERVICE

I certify that counsel of record, listed below, is being served on December 20, 2019, with a copy of this document through the CM/ECF Filing System as identified on the Notice of Electronic Filing dated December 20, 2019.

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